

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DAVID MONDRAGON**  
Claimant

VS.

**JAG CONSTRUCTION CO.**  
Respondent

AND

**EMPLOYER'S MUTUAL CASUALTY CO.**  
**BUILDERS' ASSN. SELF-INS. FUND**  
Insurance Carriers

Docket No. 248,386

**ORDER**

Respondent and Employer's Mutual Casualty Co. requested review of the July 15, 2003 Decision by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on January 6, 2004.

**APPEARANCES**

Henry A. Goertz of Dodge City, Kansas, appeared for the claimant. James M. McVay of Great Bend, Kansas appeared for respondent and Employer's Mutual Casualty Co. Wade A. Dorothy of Lenexa, Kansas, appeared for respondent and Builders' Association Self-Insurers' Fund.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board the parties agreed that the average weekly value of claimant's health insurance was \$40.38. Consequently, that amount will be used to recalculate the claimant's average gross weekly wage when the benefit was discontinued.<sup>1</sup> The parties further agreed that claimant's average gross weekly wage on July 26, 1999, was \$459.20.

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<sup>1</sup> K.S.A. 44-511(a)(2) (Furse 1993).

### ISSUES

It is undisputed the claimant suffered a work-related accident on July 26, 1999. The cement truck claimant was driving flipped over onto its side. Claimant suffered injuries to his left lower extremity as well as injury to his back, hip, head and right lower extremity. The most severe injuries were to claimant's left lower extremity and ultimately an above knee amputation was performed. Claimant returned to accommodated work for respondent on January 3, 2000, and alleged he suffered additional repetitive work-related injuries through his last day worked on January 17, 2002.

The respondent changed its workers compensation insurance coverage from Employer's Mutual Casualty Co. to Builder's Association Self-Insurer's Fund effective March 28, 2000.

The Administrative Law Judge (ALJ) determined claimant's permanent partial disability was a natural and probable consequence of the July 26, 1999 accident. Any injuries suffered during claimant's return to work from January 3, 2000, through January 17, 2002, were temporary aggravations of his conditions. Consequently, the ALJ determined claimant suffered a 39.5 percent functional impairment (which was a split of the ratings provided by Drs. John D. Osland and Philip R. Mills) and that claimant suffered a 91.5 percent work disability (based upon a 100 percent wage loss and an 83 percent task loss) for the time period from January 17, 2002, through April 24, 2002, when claimant obtained employment with the City of Dodge City. From April 24, 2002, through August 1, 2002, claimant suffered a 70 percent work disability (based upon a 57 percent wage loss and an 83 percent task loss) and after the latter date claimant's wage increased to more than 90 percent of his pre-injury wage.<sup>2</sup>

Respondent and its insurance carrier, Employer's Mutual Casualty Co., (EMC) requested review. EMC admits that it is liable for claimant's injuries suffered in the July 26, 1999 accident. But, it argues that as a result of that accident the claimant only suffered a scheduled injury to his left lower extremity. It contends claimant's additional injuries and permanent impairment resulted from his work activities from January 3, 2000, through his last day worked on January 17, 2002. Consequently, EMC's position is that respondent's subsequent workers compensation insurance carrier, Builders Association Self-Insurers' Fund, is liable for the permanent partial disability claimant suffered from his work activities after he returned to accommodated work for respondent. Finally EMC argues the ALJ's calculation of the Award contained mathematical errors.

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<sup>2</sup> Although not reflected in the ALJ's calculation of the award, when claimant's wage increased to 90 percent of his pre-injury average gross weekly wage, the claimant was still entitled to additional weeks of compensation based upon his functional impairment.

Respondent's other insurance carrier Builders' Association Self-Insurer's Fund (BASF) argues that all of claimant's permanent injuries were caused by the July 26, 1999 accident and any further worsening of claimant's condition after that date was a natural and probable consequence of the injuries suffered in that accident. Consequently, BASF requests the Board to assess all the liability against EMC or in the alternative to affirm the ALJ's Award finding BASF was liable for compensation benefits due to the temporary aggravations claimant suffered upon his return to accommodated employment.

The claimant argues that the ALJ should have based the percentage of functional impairment solely upon the rating provided by Dr. Mills. Claimant further argues the ALJ's calculation of the Award did not reflect the claimant's increased average gross weekly wage beginning May 1, 2002, when the fringe benefits were discontinued.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board agrees with the ALJ's analysis of the evidence as set forth in the Award. The Board adopts those findings and conclusions as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

Dr. John D. Osland was claimant's treating orthopedic surgeon after the July 26, 1999 accident. Dr. Osland noted that the primary injury was a severe crush injury to claimant's left lower extremity, severe tibia fracture and severe open wounds. Dr. Osland performed six surgeries on claimant's left leg including a below knee and ultimately an above knee amputation.

Dr. Osland's medical records indicate that claimant's right side was "beat up" and as early as September 22, 1999, claimant had right thigh complaints which the doctor concluded were caused by a contusion to the lateral femoral cutaneous nerve as a result of being pinned underneath the steering wheel. On October 15, 1999, claimant complained of paralysis in his right thigh. On February 4, 2000, claimant complained of soreness in his hip and back. The doctor attributed those complaints to gait problems from using a crutch or prosthetic left leg.

In May 2000, claimant suffered a fall at home and injured his right knee. Dr. Osland attributed that accident to imbalance caused by the left above-knee amputation. On August 11, 2000, Dr. Osland concluded claimant had reached maximum medical improvement and provided a 36 percent rating to the whole person for the above-knee amputation and an additional 2 percent whole person rating for claimant's back and right ankle. These ratings were attributable to the July 26, 1999 accident. The doctor noted

claimant had not reached maximum medical improvement for the injury he suffered to his right knee in the fall at home.

On May 1, 2002, the doctor provided an additional 2 percent whole person rating for claimant's right knee injury. The doctor noted that over the course of treatment he provided, the claimant would suffer episodes where he would fall and his condition would worsen but that his condition would then improve.

The claimant testified that when he returned to accommodated work for respondent performing job duties in precast that such work activities worsened his back and right leg injuries. But he agreed that his back and right leg worsened after his fall at home on May 6, 2000, and never improved after that fall.

EMC argues that claimant only suffered a scheduled injury to his left leg as a result of the July 26, 1999 accident. The Board disagrees. Simply stated, the more persuasive medical evidence in this case was provided by the treating physician Dr. Osland. The doctor ultimately concluded claimant had suffered permanent partial functional impairment to his left leg, his right knee and ankle as well as his back as a result of the July 26, 1999 accident. In his report dated June 5, 2002, Dr. Philip R. Mills also determined claimant had suffered permanent partial functional impairment to his left leg, his right knee and ankle as well as his back all attributable to the July 26, 1999 accident. Dr. Mills did opine that claimant might have permanently aggravated his back and right leg when he returned to work for respondent, but he was unable to quantify any such possible additional aggravation. And, irrespective of whether claimant suffered additional aggravation to his back, Dr. Mills agreed claimant had suffered permanent partial functional impairment to his back as a result of the July 26, 1999 accident. The claimant is not limited to a scheduled disability to his left leg as a result of the July 26, 1999 accident.

The primary contention of EMC is that claimant suffered a permanent aggravation to his right leg and back when he returned to accommodated work with respondent on January 3, 2000.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>3</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>4</sup> When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that

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<sup>3</sup> *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

<sup>4</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>5</sup>

The ALJ concluded that the permanent partial functional impairment claimant suffered was all attributable to the July 26, 1999, accident. And that upon his return to work the claimant suffered episodic temporary aggravations to his condition but no further permanent impairment. The ALJ noted:

This court finds that the Claimant's date of accident was July 26, 1999 and that all the permanent impairment to the Claimant is as a result of or a natural and probable consequence of that accident. That from January 3, 2000 through January 17, 2002, the Claimant suffered temporary aggravations of his conditions.<sup>6</sup>

The Board agrees and affirms. Dr. Osland concluded that all the permanent impairment claimant suffered was either caused by the July 26, 1999 accident or, in the case of the fall and injury to claimant's right knee, the natural and probable consequence of that accident. The ALJ ordered Dr. C. Reiff Brown to conduct an examination of claimant. Dr. Brown also testified that the fall claimant suffered which injured his right knee was a natural and probable consequence of the July 26, 1999 accident. And, as previously noted, Dr. Mills attributed all of his permanent ratings to the July 26, 1999 accident.

The Board is not unmindful that Dr. Mills opined that claimant's work activities after he returned to accommodated work for respondent might have caused a permanent aggravation but the doctor was unable to quantify what, if any, percentage claimant's impairments increased. And Dr. Brown also opined claimant's subsequent accommodated work activities aggravated his right knee condition but he could not determine whether it was a temporary or permanent aggravation. Lastly, Dr. John F. McMaster's opinion of increased permanent impairment to claimant's right leg is not persuasive because he admitted that upon examination he found nothing to indicate an impairment to the right leg and he had initially stated there was no impairment to that leg.

The claimant argues that his functional impairment should be based upon the ratings provided by Dr. Mills. The ALJ determined claimant had suffered a 39.5 percent permanent partial functional impairment which the ALJ noted was an average of the ratings provided by Drs. Mills and Osland. The Board agrees that these ratings were the most persuasive and affirms that finding.

At regular hearing, the respondent's insurance carriers stipulated to the total amount of temporary partial disability that they had provided claimant. EMC indicated it had paid

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<sup>5</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>6</sup> ALJ Award (Jul. 15, 2003) at 7.

claimant \$4,254.89 in temporary partial disability compensation and BASF had paid \$3,505.79.

The ALJ's Award correctly provided respondent a credit for the payment of temporary partial disability benefits in the calculation of the award, however, the ALJ's calculation contained some mathematical errors.

Like temporary total disability compensation, temporary partial disability compensation is intended solely as wage replacement. In this respect, temporary partial disability compensation is akin to temporary total disability compensation, as opposed to permanent partial disability compensation. The calculation for temporary total disability compensation is, likewise, tied to the average gross weekly wage that the employee was earning prior to his injury. K.S.A. 44-510c(b)(1) (Furse 1993) provides:

Where temporary total disability results from the injury, . . . weekly payments shall be made during such temporary total disability, in a sum equal to 66 $\frac{2}{3}$ % of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, . . .

Further evidence that temporary partial disability is treated the same as, and is considered a form of, temporary total disability is contained within the provisions of K.S.A. 44-510e(a)(2). This provision provides for the calculation of the number of weeks payable for permanent partial disability compensation by subtracting from the 415 weeks the total number of weeks that temporary total disability compensation was paid. This provision has, likewise, been held applicable to temporary partial disability compensation. In other words, the equivalent weeks of temporary total disability compensation are subtracted from the 415 weeks to find the total number of weeks available for an award of permanent partial general disability.

The Act is silent regarding the method and manner that temporary partial is to be considered for purposes of computing an award. In this proceeding, the respondent and its insurers have paid claimant a total of \$7,760.68 in temporary partial disability compensation. Because this sum cannot be utilized in the mathematical formula for computing an award, it must be converted to weeks. The Board finds that the proper method to convert the temporary partial disability compensation paid into a weekly equivalent is to divide the total sum paid, or \$7,760.68, by the weekly temporary total disability compensation rate, or \$306.15. Using this method, the dollar amount of the temporary partial disability compensation paid in this proceeding is equivalent to 25.35 weeks of temporary total disability compensation. Therefore, the respondent is entitled to a credit for the 25.35 weeks in the calculation of the final award.

The respondent and its insurance carriers also paid claimant an additional 43.85 weeks of temporary total disability compensation. Consequently, the calculation of the

award must include a credit for the temporary total disability compensation as well as the temporary partial disability compensation which combine for 69.20 weeks.

Initially, a payment rate must be determined, which in this case is calculated by multiplying the stipulated \$459.20 average gross weekly wage by .6667.<sup>7</sup> Such calculation computes to an amount less than the maximum provided by K.S.A. 44-510c (Furse 1993) and therefore results in the payment rate of \$306.15.

The next step is to determine the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was paid, except that the first 15 weeks of temporary total disability compensation is excluded. The remainder is then multiplied by the percentage of permanent partial general disability.<sup>8</sup>

As previously determined, the total sum paid as temporary partial disability compensation converted to 25.35 weeks of temporary total disability compensation and the sum paid as temporary total disability compensation was 43.85 weeks for a total of 69.20 weeks. Excluding the first 15 weeks leaves 54.20 weeks to subtract from 415. The result is 360.80 weeks. Multiplying that remainder by the appropriate percentage of either the functional impairment or the work disability gives the number of disability weeks payable. The number of disability weeks payable is multiplied by the payment rate to determine the amount of the award.<sup>9</sup>

The claimant also raised the issue that the Award was incorrectly calculated because it did not account for the recalculation of the average gross weekly wage when the fringe benefits were discontinued. The Board agrees.

The fringe benefits were discontinued April 30, 2002.<sup>10</sup> Effective May 1, 2002, the average weekly wage should have been recalculated to include the fringe benefits consisting of health insurance and respondent's contribution to claimant's retirement.<sup>11</sup> The claimant's average gross weekly wage increased to \$506.47 (\$459.20 + \$40.38 + \$6.89) which changed the payment rate to \$337.66 per week. Consequently, any payments due claimant beginning May 1, 2002, and thereafter would be compensated at \$337.66 per week. Because of the mathematical and computational errors in the ALJ's Award, it will be recalculated using the foregoing corrected figures.

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<sup>7</sup> K.S.A. 1999 Supp. 44-510e(a)(1).

<sup>8</sup> K.S.A. 1999 Supp. 44-510e(a)(2).

<sup>9</sup> K.S.A. 1999 Supp. 44-510e(a)(3).

<sup>10</sup> Thompson Depo. at 9.

<sup>11</sup> K.S.A. 44-511(a)(2) (Furse 1993).

Also, the ALJ determined that when the claimant started working for the City of Dodge City on April 24, 2002, his average gross weekly wage was \$283.15. This calculates to a 38 percent wage loss. When added to the claimant's 83 percent task loss, the work disability is 60.5 percent instead of 70 percent as determined by the ALJ. Accordingly, the Award will be recalculated based upon a 60.5 percent work disability for the time period from April 24, 2002 when claimant started working for the City of Dodge City through April 30, 2002, when his fringe benefits were discontinued.

Accordingly, the percentage of work disability due claimant May 1, 2002, and thereafter must be recalculated to determine the wage loss component utilizing the \$506.47 average gross weekly wage. Comparing claimant's \$283.15 average gross weekly wage with the \$506.47 average gross weekly wage, which includes the value of the discontinued benefits, calculates to a 44 percent wage loss. When added to the claimant's 83 percent task loss, the work disability is 63.5 percent. Claimant is entitled to this work disability from May 1, 2002, through July 31, 2002. As previously noted, the payment rate increased on May 1, 2002, to \$337.66.

On August 1, 2002, claimant began making an average gross weekly wage more than 90 percent of his average gross weekly wage working for respondent. Consequently, after August 1, 2002 the claimant would again be entitled to his 39.5 percent functional disability. The calculation of the Award requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, but the new total number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Decision of Administrative Law Judge Pamela J. Fuller dated July 15, 2003, is modified to reflect the average weekly value of claimant's health insurance benefit is \$40.83 and to correct the calculation of the Award. The Decision is affirmed in all other respects.

The claimant is entitled to 69.2 weeks of temporary total disability compensation at the rate of \$306.15 per week or \$21,185.58 followed by 60.14 weeks of permanent partial disability compensation at the rate of \$306.15 per week or \$18,411.86 for a 39.5 percent functional disability followed by 13.86 weeks of permanent partial disability compensation at the rate of \$306.15 per week or \$4,243.24 for a 91.5 percent work disability followed by 1 weeks of permanent partial disability compensation at the rate of \$306.15 per week or \$306.15 for a 60.5 percent work disability followed by 13.14 weeks of permanent partial disability compensation at the rate of \$337.66 per week or \$4,436.85 for a 63.5 percent work disability followed by 54.23 weeks of permanent partial disability compensation at the rate of \$337.66 per week or \$18,361.95 for a 39.5 percent functional disability, making a total award of \$66,945.63 which is due, owing and ordered paid in one lump sum less amounts previously paid.



**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Henry A. Goertz, Attorney for Claimant  
James M. McVay, Attorney for Respondent and Employer's Mutual Casualty Co.  
Wade A. Dorothy, Attorney for Respondent and Builder's Assn. Self-Ins. Fund  
Pamela J. Fuller, Administrative Law Judge  
Anne Haught, Acting Workers Compensation Director